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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

JOHN HENRY SELVAGE,
*Petitioner*

v.

JAMES A. LYNAUGH, Director
Institutional Division,
Texas Department of Criminal Justice,
*Respondent*

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## BRIEF FOR AMICUS CURIAE HARRIS COUNTY CRIMINAL LAWYERS ASSOCIATION

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15 pp

# TABLE OF CONTENTS


| | Page |
|---|---|
| LIST OF AUTHORITIES | II |
| IDENTIFICATION OF AMICUS CURIAE | 2 |
| STATEMENT OF AMICUS CURIAE | 2 |
| ARGUMENTS AND AUTHORITIES | 3 |
| *Smith v. Murray* Requires Lawyers to Foresee Changes in the Law, not to Anticipate Unlikely Possibilities | 4 |
| No Instruction on Mitigation: An Unbroken Line of Cases | 5 |
| The Futility of Seeking an Instruction on Mitigating Evidence | 8 |
| The Texas Situation is Novel | 9 |
| Only Good Faith Arguments May Be Presented to Texas Courts | 9 |
| A Procedural Bar Would Result in a Fundamental Miscarriage of Justice | 10 |
| CONCLUSION | 11 |
| CERTIFICATE OF SERVICE | 12 |

## LIST OF AUTHORITIES


| CASES | Page |
|---|---|
| *Clark v. State*, 717 S.W.2d 910 (Tex. Crim. App. 1986), *cert. denied*, 481 U.S. 1059 (1987) | 6 |
| *Demouchette v. State*, 731 S.W.2d 75 (Tex. Crim. App. 1986), *cert. denied*, 482 U.S. 920 (1987) | 5, 6 |
| *Eddings v. Oklahoma*, 455 U.S. 104 (1982) | 5 |
| *Engle v. Isaac*, 456 U.S. 107 (1982) | 4, 9 |
| *Franklin v. Lynaugh*, 487 U.S. 164 (1988) | 5, 9, 10, 11 |
| *Jurek v. Texas*, 428 U.S. 262 (1976) | *passim* |
| *King v. State*, 553 S.W.2d 105 (Tex. Crim. App. 1977), *cert. denied*, 482 U.S. 921 (1978) | 5, 6 |
| *Lackey v. State*, No. 69,144 (Tex. Crim. App. June 14, 1989) (not yet reported) (rehearing granted) | 8 |
| *Lockett v. Ohio*, 438 U.S. 586 (1978) | 5, 7, 12 |
| *Mazuera v. State*, No. 01-89-00244-CR (Tex. App.—Houston [1st Dist.] Sept. 28, 1989) (not yet reported) | 10 |
| *McCleskey v. Kemp*, 481 U.S. 279 (1987) | 5 |
| *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987) | 7, 8 |
| *Penry v. Lynaugh*, 492 U.S. ____, 109 S. Ct. 2934 (1989) | *passim* |
| *Penry v. State*, 691 S.W.2d 636 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1073 (1986) | 7 |
| *Quinones v. State*, 592 S.W.2d 933 (Tex. Crim. App. 1980), *cert. denied*, 449 U.S. 893 (1980) | 6 |
| *Reed v. Ross*, 468 U.S. 1 (1984) | 4 |
| *Smith v. Murray*, 477 U.S. 527 (1986) | 2, 4 |
| *South Carolina v. Gaithers*, ____U.S.____, 109 S. Ct. 2207 (1989) | 12 |

| CONSTITUTIONS AND STATUTES | |
|---|---|
| TEX. CODE CRIM. PROC. ANN. art. 37.071 | *passim* |
| SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS, art. XII, section 8 (Code of Professional Responsibility) DR 7-102(A)(2) | 10 |


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## BRIEF FOR AMICUS CURIAE HARRIS COUNTY CRIMINAL LAWYERS ASSOCIATION

*To the Justices of the Supreme Court of the United States:*

COMES NOW AMICUS CURIAE, HARRIS COUNTY CRIMINAL LAWYERS ASSOCIATION, by and through its attorneys of record, STANLEY G. SCHNEIDER and TOM MORAN, and pursuant to Rule 36.1, it would respectfully show the Court as follows:

## IDENTIFICATION OF AMICUS CURIAE

The Harris County Criminal Lawyers Association [hereinafter the Association] is an unincorporated association of attorneys engaged in the practice of criminal law in the courts of Harris County, Texas. Many of the members of the Association have represented persons charged with capital murder. In addition, approximately half of the persons sentenced to death in Texas were tried in Harris County.

All parties have given the Association permission to file this brief. Copies of the letters of permission have been filed with the Clerk of this Court.

The Association appears for Petitioner.

## STATEMENT OF AMICUS CURIAE

The question facing this Court is whether the procedural bar rule in *Smith v. Murray,* 477 U.S. 527 (1986), applies in Texas death penalty cases in which the defense attorney at trial did not object to the lack of instructions on consideration of mitigating evidence.

The Association believes that prior to the time this Court handed down its decision on *Penry v. Lynaugh,* 492 U.S. ____, 109 S. Ct. 2934 (1989), the law in Texas was well settled that no instructions on mitigation were necessary. An unbroken string of case law dating back to *Jurek v. Texas,* 428 U.S. 262 (1976), and including numerous decisions of the Court of Appeals for the Fifth Circuit and the Texas Court of Criminal Appeals, upheld the constitutionality and application of the Texas death penalty sentencing scheme. At some point, in the face of unanimous authority from the Supreme Court of the



United States, the Court of Appeals for the Fifth Circuit and the state's highest court for criminal cases, lawyers must be willing to accept precedent and abandon claims that are foreclosed. If, at some later date, this Court reconsiders the previously foreclosed issue and determines that its previous holdings are no longer consistent with evolving constitutional interpretation, failure to raise an issue at trial should not be a procedural bar.

The Association would show that the law in Texas was so well settled that only 12 days before this Court announced its decision in *Penry,* the Court of Criminal Appeals again rejected a similar argument.

## ARGUMENTS AND AUTHORITIES

In *Jurek v. Texas,* 428 U.S. 262 (1976), this Court told the lawyers of Texas that the Texas death penalty sentencing scheme "has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function." 428 U.S. at 276. This Court further held that Texas has provided a system that is "evenhanded, rational and consistent" and that the system "serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed. . . ." *Id.*

Thirteen years later, in *Penry,* this Court held that the Texas death penalty scheme embodied in TEX. CODE CRIM. PROC. ANN. art. 37.071 fails to sufficiently instruct juries in the ways to consider and give effect to all types of mitigating evidence and that Article 37.071 as interpreted by the Court of Criminal Appeals fails to provide a vehicle for the jury to provide a "reasoned moral response" to that evidence in rendering its sentence. 492 U.S. at ____, 109 S. Ct. at 2952.

The question presented to this Court in the instant case is relatively straight-forward. Stated simply, this Court is being asked to decide whether Texas lawyers should be excused from making arguments later accepted by this Court in *Penry* in the decade and a half between this Court's decision in *Jurek* and its decision in *Penry*.

The Association, for the reasons outlined below, contends that the answer should be in the affirmative.

### *Smith v. Murray* Requires Lawyers to Foresee Changes In the Law, Not to Anticipate Unlikely Possibilities

In *Smith v. Murray*, this Court held that the procedural bar rule of *Engle v. Isaac*, 456 U.S. 107 (1982), applies when an appellate attorney makes a conscious decision to abandon a claim on direct appeal if state law would bar that claim in a later state habeas proceeding. In *Smith*, the attorney on direct appeal was also the attorney at trial. He properly preserved his error with an objection at trial but on direct appeal deliberately chose to abandon the claim because he felt the claim had little chance of success before the Virginia Supreme Court. 477 U.S. at 534.

In considering cause for procedural default, this Court has recognized that if a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has "cause" for his failure to raise the claim in accordance with applicable procedures. *Reed v. Ross*, 468 U.S. 1, 18 (1984). The key question is not the later decisions of this Court but rather whether the defendant's claim was "available" at all at the time of the default. *Smith*, 477 U.S. at 537.



Texas death penalty cases involving *Penry* issues are not situations in which a well-informed lawyer could anticipate a change in the law. Nor are they situations in which a well-informed, well-prepared lawyer would raise the issue at trial or on direct appeal. Rather, based on an unbroken string of authority, the issue of instructions on mitigation was flatly foreclosed.

### No Instructions on Mitigation: An Unbroken Chain of Cases

Since 1976, the Court of Criminal Appeals has refused to reinterpret Article 37.071, to grow or to apply this Court's decisions in such cases as *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); and *McCleskey v. Kemp*, 481 U.S. 279 (1987). Even in the wake of *Franklin v. Lynaugh*, 487 U.S. 164, (1988), the Court of Criminal Appeals continued to repeat dogmatically that the Texas death sentencing system was upheld in *Jurek* and that no instructions on mitigating evidence were necessary.

The most telling example of the Court of Criminal Appeals' reaction to this Court's evolving interpretation of constitutional principles can be seen in a comparison between *King v. State*, 553 S.W.2d 105 (Tex. Crim. App. 1977), *cert. denied*, 434 U.S. 1088 (1978); and *Demouchette v. State*, 731 S.W.2d 75 (Tex. Crim. App. 1986), *cert. denied*, 482 U.S. 920 (1987).

In *King*, the Court of Criminal Appeals overruled an argument that Article 37.071, without further definitions and instructions, does not give juries adequate guidance to determine the issues. The Court used the following language:

> In *Jurek v. Texas,* however, the Supreme Court of the United States concluded that the submission of special issues provided by Art. 37.071, *supra,* constitutionally guided the jury's determination of the punishment issues. No special definitions of the terms of that statute were required.

553 S.W.2d at 107 (citations omitted).

In *Demouchette,* the Court of Criminal Appeals was presented with the issue of whether Article 37.071 allows the jury to consider or apply mitigating evidence because the statute does not inform a jury how to apply the evidence. The Court overruled the argument with the following language (which is quoted herein in full):

> The Texas capital murder scheme, including the special issues under Article 37.071, *supra,* was held to be constitutional in *Jurek v. Texas.* The fifteenth ground of error is overruled.

731 S.W.2d at 80 (citations omitted).

In the years between *King* and *Demouchette,* the Court of Criminal Appeals specifically rejected submission of a charge of mitigation. In *Quinones v. State,* 592 S.W.2d 933, 947 (Tex. Crim. App. 1980), *cert. denied,* 449 U.S. 893 (1980), the Court of Criminal Appeals agreed with the Appellant that there was a right to present all mitigating evidence but rejected his argument that an explanatory charge is necessary to protect that right. The Court, again citing *Jurek,* said that this Court had upheld the Texas death penalty scheme.

In *Clark v. State,* 717 S.W.2d 910, 920 (Tex. Crim. App. 1986), *cert. denied,* 481 U.S. 1059 (1987), the Court again rejected an argument that Article 37.071 is unconstitutional for its failure to provide adequate



procedural safeguards by merely permitting the defendant to present all mitigating evidence without ensuring that the jury, under appropriate instructions considers and weighs the mitigating factors. Among the cases relied upon by the Court to reject Clark's argument was *Penry v. State,* 691 S.W.2d 636 (Tex. Crim. App. 1985), *cert. denied,* 474 U.S. 1073 (1986).

Not only did the Court of Criminal Appeals consistently reject arguments that additional instructions on mitigation were unnecessary but the Court of Appeals for the Fifth Circuit consistently agreed and, relying on *Jurek* and *Lockett,* held that such instructions were not required by the United States Constitution. In *Penry v. Lynaugh,* 832 F.2d 915, 925 (5th Cir. 1987), a panel of the Fifth Circuit questioned the viability of *Jurek* but held that Article 37.071 had been specifically upheld in *Jurek.* The panel further held as follows:

> *Jurek* expressly held that the Texas statute is constitutional. After *Jurek,* the Court has reiterated that stance a number of times. For example, in *Lockett* the Court stated that the Texas statute "survived the petitioner's Eighth and Fourteenth Amendment attack because three Justices concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question—despite its facial narrowness—so as to permit the sentencer to consider 'whatever mitigating circumstances' the defendant might be able to show." Similar reasoning has been used in a number of other cases. *See, e.g. Zant; Lockhart v. McCree.* We think that a strong argument can be made that developing law, *see, e.g. Hitchcock* is inconsistent. However, even if we were free to decide that inconsistency and reach a different result, *see Brock v. McCotter,* we are not free to do so because prior Fifth Circuit decisions have rejected

> claims similar to Penry's. *Riles v. McCotter; Granviel v. Estelle*. These prior panel holdings bar a different holding by us.

832 F.2d at 926 (citations omitted).

Hence, not only lawyers but also members of the Fifth Circuit recognized that the questions of mitigating instructions was foreclosed in 1987.

## The Futility of Seeking an Instruction on Mitigating Evidence

In the wake of the unbroken string of rulings upholding Article 37.071, many Texas lawyers have abandoned any effort to object to the lack of instructions or definitions. The Court of Criminal Appeals had for 13 years given continuous constitutional approval to Article 37.071. For a dozen years, defense arguments that additional guidance was necessary for juries fell on deaf ears.

Although some Texas defense lawyers continued the futile objections and requests for instructions, their efforts were continually frustrated for a decade. Thereby, many Texas lawyers have not felt compelled to object to the settled and constitutionally-approved procedures in Article 37.071. Not only have Texas lawyers stopped objecting but judges on the Court of Criminal Appeals have stopped dissenting from death penalty affirmances because their dissent would be futile. This is most recently stated by Judge Miller in *Lackey v. State*, No. 69,144 (Tex. Crim. App. June 14, 1989) (rehearing granted):

> In as much as Judge Clinton's dissent continues the belief that jurors in a capital murder case need a special instruction on mitigating evidence, as aptly set out in Stewart v. State, 668 S.W.2d 118 (Tex. Crim. App. 1984) (Clinton, J. joined by Miller, J., Dissenting), I join his dissent on the disposition of point of error number four. We only stopped dissenting to the majority's steadfast refusal to require such an instruction because to continue to do so was "futile." See Johnson v. State, 691 S.W.2d 619 (Tex. Crim. App. 1984) (Clinton, J. joined by Miller, J., dissenting).



## The Texas Situation is Novel

Any application of the contemporaneous objection rule to Article 37.071 would be inapplicable due to the unique Texas situation. Texas lawyers were handicapped by over a decade of interpretations of the same questions by the courts and there was no change in the response. In addition, the Texas Legislature has not intervened.

Applying the rule of *Engle v. Isaac* to the instant case would be unjust and inappropriate because of the history of the application of Article 37.071.

In *Engle v. Isaac*, this Court held that a state court defendant who perceives a constitutional claim which he believes may find favor in federal court may not bypass the less sympathetic state court. Such is not the case in the instant case and others involving Article 37.071. Until *Franklin*, this Court never questioned the constitutionality of Article 37.071. At some point, continuing to put forward arguments which have been previously rejected numerous times becomes futile.

## Only Good Faith Arguments May Be Presented to Texas Courts

In Texas, an attorney faces professional discipline if if he knowingly advances a claim or asserts a position

that is unwarranted under existing law or which cannot be supported by a good faith argument for extension, modification or reversal of existing law. SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS, art. XII, section 8 (Code of Professional Responsibility) DR 7-102(A)(2) [hereinafter Texas Code of Professional Responsibility].

It is difficult to see how an attorney—at least prior to *Franklin*—could argue that requests for instructions and definitions on mitigation were good faith arguments for modification or reversal of the existing law.

*See also Mazuera v. State*, No. 01-89-00244-CR (Tex. App.—Houston [1st Dist.] Sept. 28, 1989) (not yet reported).

**A Procedural Bar Would Result in A Fundamental Miscarriage of Justice**

The Association believes that the authority cited above is sufficient cause for not raising a claim based on *Penry*, at least before this Court handed down its decision in *Franklin*. Even if that position is incorrect, the Association believes that applying the procedural bar rule in this type of case would be a fundamental miscarriage of justice.

Given the strength of the authority in Texas that no instructions or definitions on mitigation were necessary, the frustration of the minority of the Court of Criminal Appeals (who later were proven right by this Court in *Penry*) and the Code of Professional Responsibility, it is easy to see how a competent and effective Texas lawyer, at least prior to *Franklin*, would fail to seek an instruction or definition on mitigating evidence in a death penalty case.



The Association submits that there are numerous cases in which mitigating evidence which is even stronger than that presented in *Penry* was introduced at trial—or could have been introduced at trial if the defense attorney believed that there was a possibility that the trial court would give a definition or instruction on the application of the mitigating evidence. As this Court pointed out in *Penry*, much of this evidence can be a two-edged sword: at the same time diminishing the defendant's blameworthiness and increasing the probability he will be dangerous in the future. 492 U.S. at ____, 109 S. Ct. at 2949.

It would be a miscarriage of justice to send those defendants to their deaths when their attorneys based their strategies on good faith reliance on the continuous rulings of the highest courts.

**CONCLUSION**

The Association believes that there was "cause" for the failure to raise a claim based on the arguments advanced in *Penry* and that the application of the procedural bar rule to those claims would result in a "fundamental miscarriage of justice" in light of the consistent decisions of the Court of Criminal Appeals after this Court's decision in *Jurek* and prior to *Franklin*.

Texas lawyers were entitled to rely on the long line of post-*Jurek* decisions upholding the sentencing scheme embodied in Article 37.071 and the lack of necessity for additional instructions on mitigation. As Justice Scalia wrote last Term, "Indeed, I had thought that the respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their

existence, and the surrounding law becomes premised upon their validity." *South Carolina v. Gaithers*, ___ U.S. ___, ___, 109 S. Ct. 2207, 2218 (1989) (Scalia, J., dissenting).

Texas lawyers and judges adjusted to the holdings of this Court in *Jurek* and its reaffirmation in *Lockett*. Neither they nor their clients should now be penalized for that reliance.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that copies of this brief of amicus curiae was served on all parties pursuant to Rule 28.

STANLEY G. SCHNEIDER